INDEX

CITATIONS

Cases:

Statutes and Rules:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 788

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
Appellants,

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Pursuant to Rule 16(3) of the Rules of this Court, appellants submit this Brief in Opposition to the Motions to Dismiss or Affirm which have been filed by appellees United States and American Society of Composers, Authors and Publishers.

I

THE MOTIONS TO DISMISS ARE WITHOUT MERIT

The motions to dismiss filed by appellees assert that this Court has no jurisdiction in this case to review the denial of a motion to intervene as of right under

Rule 24(a) of the Rules of Civil Procedure. In brief, the assertion rests upon the contention that the denial by the court below of such a motion to intervene in an antitrust proceeding brought by the United States is not a "final judgment" of the district court which may be appealed to this Court under the Expediting Act (15 U.S.C. § 29), and that an appeal lies only from the antitrust decree itself. The contention is without merit.

1. Appellees overlook or ignore the distinction which this Court has drawn between appeals from the denial of intervention as of right, and appeals in which the intervention sought is within the discretion of the court which denied the motion. In *Railroad Trainmen* v. *B & O R.R. Co.*, 331 U.S. 519, the Court made the distinction crystal clear (at pp. 524-525):

> "Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it."[1]

Earlier, in *Allen Calculators* v. *National Cash Register Co.*, 322 U.S. 137, the Court had explained the reason for the distinction: the Court will require an appeal

[1] It is not surprising that the commentators, without exception, state that an appeal lies, under the Expediting Act as well as in other situations, from a denial of a motion to intervene as of right. See, *e.g.*, Stern & Gressman, Supreme Court Practice, p. 37 (2d ed. 1954); Wolfson & Kurland, Jurisdiction of the Supreme Court of the United States, pp. 306-307 (1951); 4 Moore, Federal Practice, p. 102, 106 (2d ed. 1948); 2 Barron & Holtzhoff, Federal Practice and Procedure, p. 235 (Rules ed. 1950); Moore & Levi, Federal Intervention, 45 Yale L.J. 565, 581-582 (1936); 7 Cyclopedia of Federal Procedure, pp. 48-49 (3d ed. 1951).

to be taken from the final decree in the proceeding below if it is requested to review the exercise of discretion by a lower court in denying *permissive* intervention, under Rule 24(b), because (p. 142) "[t]he exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record."[2]

Nor is there any basis for the suggestion by appellees that a distinction should be made between direct appeals to this Court in antitrust cases and such appeals in other cases. Apart from the fact that there is no apparent reason for such a distinction, it is squarely at odds with the opinion of the Court in *Sulphen Estates* v. *United States*, 342 U.S. 19. In that case the Court declared (at pp. 20-21):

> "If appellant may intervene as of right, the order of the court denying intervention is appealable. See *Railroad Trainmen* v. *B & O R. Co.*, 331 U.S. 519, 524, 32 Stat. 823, as amended, 15 U.S.C. (Sup. II) § 29. It was to resolve that question that we postponed the question of our jurisdiction of the appeal to the hearing on the merits."

The Court's combined citation of the *Railroad Trainmen* case and the portion of the Expediting Act relat-

---

[2] Appellees have referred to the Allen Calculators case in support of their position (U.S., pp. 8-9; ASCAP, p. 6), but only to the portion of the opinion which deals with the review of the permissive intervention which had been sought under Rule 24(b). They have neglected to point out that before reaching that question the Court had considered the grounds for appellants' intervention as of right, had found that none of them could be supported, and had expressly recognized that where "as to the intervenor, the action [of the court below] was final," the appeal would be entertained. 322 U.S. at p. 141.

ing to antitrust appeals (15 U.S.C. § 29) could have meant only that it saw no distinction between appeals taken to this Court under that statute from a denial of intervention as of right in antitrust cases and such appeals under any other statute providing for direct appeals from decisions of district courts. Such appeals might arise, for example, in the other category of cases embraced by the Expediting Act, suits under the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. § 1 *et seq.*) in which the United States is a complainant,[3] or as did the appeal from the denial of the motion to intervene as of right in the *Railroad Trainmen* case itself. There the appeal was taken directly to this Court under Section 238 of the Judicial Code of 1911 (28 U.S.C. § 345 (1946 ed.)), which provided for direct appeals under the Expediting Act (both antitrust and interstate commerce cases) as well as from judgments in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission, which was the issue on the merits in the *Trainmen* case.[4]

Moreover, contrary to what appellees suggest (U.S., p. 9; ASCAP, p. 6), there is no indication in the *Sutphen Estates* opinion that this Court would not have decided the appeal on its merits had the appeal been taken from the order denying the motion to intervene alone. Indeed, the judgment "dismissing" the appeal, after the Court considered whether the motion to intervene had been properly denied is entirely in accord with

[3] The Expediting Act, 32 Stat. 823, as amended, is codified under both 15 U.S.C. § 29 and 49 U.S.C. § 45.

[4] See 331 U.S. at p. 523, and the Jurisdictional Statement (pp. 2, 7) and Brief in Opposition to Motions to Dismiss or Affirm (pp. 2-3) in the Railroad Trainmen case, No. 970, October Term, 1946.

the Court's view that the decision as to whether the appeal was to be allowed turned upon the decision on the merits of the intervention.

Reliance by appellees on *United States* v. *California Cooperative Canneries*, 279 U.S. 553, and *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, is likewise misplaced. The *California Canneries* case held no more than that the Expediting Act precluded an appeal to a court of appeals by one who had been denied permission to intervene in a Government antitrust suit. The Court did not deal with the question of what orders could be appealed to this Court under that statute except to state generally that appeals were to be taken from decrees "which disposed of all matters," not "from an interlocutory decree". 279 U.S. at pp. 557-558. However, the Court cited *Collins* v. *Miller*, 252 U.S. 364, which expressly recognized that an appeal may be taken from a denial of intervention as of right in one of the situations specifically provided for in Rule 24(a)—where the applicant will be adversely affected by a disposition of property which is subject to the court's control. *Id.* at pp. 370-371. See also *Credits Commutation Co.* v. *United States*, 177 U.S. 311, 316.

The fragmented quotation from this Court's opinion in the Canneries case which appears in the brief of appellee ASCAP (pp. 5-6) is grossly misleading. By joining together two entirely unconnected thoughts, appellee ASCAP would have it appear that this Court declared that no appeal could be taken *to this Court* from a denial of a motion to intervene in an antitrust suit. In fact, the words "denial of a motion for leave to intervene" which are quoted in the ASCAP brief are found in the following sentence of this Court's opinion (279 U.S. at p. 559):

> "The purpose of Congress to expedite such [antitrust] suits . . . would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

The *Pipe Line* case, of course, was a successful appeal from the denial of a motion to intervene. Appellee United States seeks to distinguish it on the ground that "unlike here, no final judgment on the merits of the [antitrust decree] modification proceeding had been entered prior to the appeal from the order denying intervention or prior to this Court's decision on appeal" (U.S., p. 10). We can discern no rational basis for a distinction which would so qualify the rule heretofore announced by the Court in respect to appeals from denials of motions to intervene. Nor do we understand how it is thought to be significant that the right of the intervenor to participate as a party in the antitrust proceeding in the *Pipe Line* case stemmed from the provisions of the decree itself.[6] Here—like the intervenor in *Sutphen Estates, supra*—we rely upon the terms of Federal Rule 24(a) to establish a coordinate right to intervene. Just as this Court had jurisdiction to construe the terms of the decree in the *Pipe Line* case and the right asserted by the intervenor thereunder, it has jurisdiction here to construe Federal Rule 24(a) and the right to intervene appellants assert under the rule. Surely, no distinction is warranted between these two sources of intervention as of right. Denial of appellants' requested intervention here was, no less than in the *Pipe Line* case, "a definitive adjudication, and so appealable." See 312 U.S. at p. 508.

[6] There is no merit in the suggestion of appellee United States (p. 10 & n. 8) that in the Pipe Line case the court that had denied intervention had rendered an "opinion"—but not a "final decree"—on the merits of the proceeding in which intervention had been sought, but that the District Court here has rendered a "judgment" on the modification of the consent decree. Mr. Justice Frankfurter, in commenting upon the "opinion" of the court below in the Pipe Line case, and apparently treating it as a "judgment", stated that this Court would "assume that the district court will

2. Were the question one of first impression—which it is not—orderly procedure and proper appellate practice would both support the principle that an appeal will lie from an order of a lower court denying a motion to intervene as of right. Appellants took this appeal from the District Court's order denying the requested intervention pursuant to Federal Rule 24(a), because they were neither in fact nor in law parties to the proceeding in the court below. As *amici curiae*, appellants had no right to appeal from the judgment entered by the District Court on January 7, 1960, or to object in any way to the proceedings in the court below. See Jur. St., p. 25. Appellants were required to achieve the status of parties before they could voice any effective objection; and the *California Canneries* case, *supra*, makes clear that there is no tribunal other than this Court to which appellants can turn for this purpose. In the words of this Court in the *Railroad Trainmen* case, *supra*, "since [the intervenor as of right] cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention had the degree of definitiveness which supports an appeal therefrom [citing the *Pipe-Line* case, *supra*]". 331 U.S. at p. 524.

---

adjust the right which belongs [to the intervenor] with full regard to that public interest which underlay the original suit." 312 U.S. at p. 509. The District Court below could no doubt take similar action were this Court to hold that appellants here should have been permitted to intervene under Federal Rule 24(a). If appellants are permitted to intervene, it will become appropriate for the District Court to entertain a motion—made by appellants or perhaps by the United States—to vacate the judgment of January 7, 1960, and to conduct further proceedings to modify the antitrust decree. This procedure would dispose of the contention of appellees (U.S., p. 8; ASCAP, p. 7) that the question of intervention has become moot.

II

THE MOTIONS TO AFFIRM SHOULD BE DENIED

Appellees, in undertaking to foreclose full consideration of this appeal, rely upon unfounded assumptions and upon unwarranted fears as to what might occur in this or other antitrust suits if appellants were permitted to intervene. Appellees do not challenge, in any real sense, the substantiality of the questions appellants have raised.

1. Appellee United States asserts that appellants would have the "power to veto entry of any consent judgment" were they granted the right to intervene in the proceeding below (U.S., p. 11). Although the assertion is not explained, nor is any authority cited, it appears to rest upon appellee's assumption that any modification in the 1950 judgment was dependent upon the consent of the parties. This assumption is unfounded for several reasons.[7]

First, the United States, with the consent of the defendants, expressly reserved in the 1950 decree full power to apply to the District Court for modifications of the judgment in any respect. Article XVII of the decree provides (R. 123):

---

[7] Appellee ASCAP apparently relies upon the same assumption, although its position on the question is not clear. It states, somewhat obliquely, that the District Court was of the view that it could not compel any party to consent to a judgment other than the one presented on consent, nor could it do so "indirectly, without hearing evidence" (ASCAP, pp. 5-6). This does not, however, inform us of appellee ASCAP's views as to whether the 1950 judgment or whether the court below could have ordered a Government could have sought a contested modification of the modification over the objection of the parties.

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

"It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and at any time within two (2) years from said date apply to this Court for the vacation or modification of Section C(C) thereof). . . ."

Modification resulting from the procedures contemplated by Article XVII—an evidentiary hearing on the issues raised by the proposed modification—would not be subject to veto by appellants, were they permitted to intervene, any more than it would be subject to veto by ASCAP itself. The Government makes no reference to this Article in its motion.

Second, and even apart from the express, agreed-to reservation of power in Article XVII, the District Court would probably have the power, after an evidentiary hearing, to order a modification of the 1950 judgment, even over the objections of the parties. That the order was entered by consent is no bar to this procedure. *Hughes v. United States*, 342 U.S. 353, 357-358; *Liquid Carbonic Corp. v. United States*, 350 U.S. 869. This, indeed, has been the interpretation of these

decisions by the Department of Justice itself. See *Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary*, 85th Cong., 2d Sess., ser. 9, vol. 3, pp. 3748-3749 (1958); and Subcommittee No. 5, House Committee on the Judiciary, Report on "Consent Decree Program of the Department of Justice", dated January 30, 1959, pursuant to H. R. Res. 27, 86th Cong., 1st Sess., pp. 5, 293. Yet there is no reference to these decisions in the brief of appellee United States. While we recognize that the construction by the Department of Justice of the *Hughes* and *Liquid Carbonic* cases is open to challenge,[8] it is apparent that it presents a substantial question of law which should not be summarily decided by the Court.[9]

---

[8] *Cf.* Dabney, 'Antitrust' Consent Decrees: How Protective an Umbrella?, 68 Yale L.J. 1391, 1394 (1959).

[9] Indeed, it was also open to the United States to proceed by way of a request for an order interpreting the existing 1950 decree to require ASCAP to revise its implementation thereof. In such a proceeding, the United States could properly have insisted that the revision was required by ASCAP's non-compliance with the Government's interpretation of the existing language of the decree. The District Court would have had the power to enforce the Government's interpretation of the decree, ASCAP's interpretation of the decree, or its own interpretation. *Cf.*, Sigmund Timberg (who represented the Government in the 1950 decree negotiations), The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment, 19 Law & Cont. Prob. 294, n.2 at pp. 294-295 (1954):

> "... The District Judge who entered the judgment in conformity with the prevailing practice, gave no indication of the legality or illegality of ASCAP's past organization or contemplated reorganization, or of its old or new practices. The interpretation of the document, at any moment of time, is for the current officers of the Department of Justice and the then legal representatives of ASCAP and, in the event of their disagreement, for the Federal District Court for the Southern District of New York."

2. Appellee United States, in seeking to show that appellants' interest was adequately represented by the Department of Justice in the court below, does not take issue with the specific grounds upon which appellants rest their claim of inadequate representation (Jur. St., pp. 16-20). The Government does not dispute appellants' contentions that the judgment of January 7 leaves control of the Society's voting and royalty distribution, and of the conduct of the survey of performances, in the hands of the same dominating publishers as in the past. Appellee relies instead upon generalized statements contained in other cases that the Attorney General is "the guardian of the public interest" and upon the assertion that the administration of the antitrust laws will be adversely affected if appellants are permitted to intervene (U.S., pp. 15-19).

Appellants' requested intervention in the Department's reopened proceeding against ASCAP differs basically from the intervention which has been sought by private parties in other Government antitrust proceedings (Jur. St., pp. 21-22). This proceeding against the Society concerns only the competitive rights under the antitrust laws of ASCAP members *inter sese*. Appellants are members of the only economic group—the ASCAP membership—on whose behalf the Government purported to act in negotiating a modification of the 1950 judgment with the Society's Directors. Accordingly, in this suit "the public interest" does not call for the Attorney General "to bring about a feasible accommodation of producer, consumer, and other interests" (U.S., pp. 15-16). Rather, as explicitly stated in the 1950 judgment, the "public interest" calls for the Attorney General to achieve "a democratic administration of the affairs of defendant ASCAP" (R. 119).

General references to the guardianship of the Attorney General cannot conceal the substantial character of the question whether appellants' interest has not been inadequately represented. Neither the Court nor appellants have been advised how it is consistent with their rights, or with the "public interest", to insist that appellants be satisfied with "some improvement, even if slight" (U.S., pp. 4, 12; ASCAP, pp. 12-13) over the prior situation.

3. The fears of appellee United States that granting appellants' requested intervention would adversely affect the Government's administration of the antitrust laws are unwarranted. Allowing intervention by appellants in the proceeding in the court below would decidedly not "open the door to a multitude of intervenors, each clothed with power to introduce evidence, inject additional issues, and exercise right of appeal" with a "resulting proliferation of appeals" (U.S., p. 16 & n.12). Intervention in the circumstances of this suit, as we have indicated (Jur. St., pp. 21-22), differs fundamentally from intervention that has been sought in every other Government antitrust case we have been able to discover. Moreover, appellants have not sought to "inject additional issues" in the proceeding below; they seek only to urge and support by evidence their positions on questions already raised by the proposed modification of the 1950 judgment that had been negotiated by the Department of Justice and the Society's Directors. Now would there be a "proliferation of appeals"; if there were any appeal at all after a proceeding in which appellants had participated, it would be the single appeal to this Court under the Expediting Act.

4. It is evident that there is a broad area of difference between the parties to this appeal as to whether appellants are bound by the District Court's judgment of January 7, 1960. Appellee United States urges that, "[W]ith respect to any claim or cause of action which appellants may have against ASCAP, the judgment is not *res judicata* and appellants are not bound by the judgment." (U.S., p. 13).

This issue has already been considered at length in the Jurisdictional Statement (pp. 26-29). There is, to say the very least, a substantial question raised by appellants' claim that they are foreclosed from asserting that actions taken by the Society's Board of Directors pursuant to the terms of the judgment—the system of voting there provided, the conduct of the survey, the method of distributing royalty revenues—inflict upon them and other smaller members of ASCAP unlawful competitive injury that violates the antitrust laws. An ASCAP member seeking to challenge under the antitrust laws any practices provided for or permitted by the judgment would, we submit, confront the defense that he is estopped from asserting such claims because, as a member of the Society, he was represented in the proceeding in which the judgment was entered, is bound by the judgment, and must therefore abide those practices. Were the ASCAP member to reply that he was not adequately represented in the prior Government antitrust proceeding, the rejoinder would certainly be that that was a matter for determination in the proceeding brought by the United States—the issue which appellees would now foreclose. The suggestion that appellants be remitted to their

right to bring private antitrust suits (U.S., pp. 16-17) is thus but a hollow promise.[10]

CONCLUSION

There can be no reasonable doubt that this Court has jurisdiction of the appeal, and that it should be considered on its merits. These merits, as is evident from the discussion *supra*, raise substantial questions of importance in the administration of the antitrust laws and of Rule 24(a) of the Federal Rules of Civil Procedure, which should not be decided without plenary briefs and

[10] Appellee United States is, in addition, in error when it asserts that "appellants do not consider themselves . . . bound by the judgment." (U.S., p. 13 & n. 11). The state court action referred to in appellee's brief marks an attempt by ASCAP members to compel the Society's Board of Directors to adhere, in their voting and other practices, to the laws of New York state to which ASCAP is subject. Indeed, the ASCAP members bringing suit acknowledged the binding effect of the antitrust decree upon them as members of the Society and upon the Society itself. They allege, however, that in certain respects the New York courts may interpret state law as regulating more strictly than the federal antitrust statutes the competitive relations of ASCAP members among themselves. The state court action seeks, further, to compel the Society's directors to account under state law for the manner in which they have distributed ASCAP's license revenues. See opinion by Mr. Justice McGivern on February 14, 1958, N.Y. Sup. Ct., in Longsfelder, et al. v. Cunningham, reprinted in New York Law Journal, p. 7, February 18, 1958. The theory of the Longsfelder case, which has not yet been decided, is thus no more than that ASCAP members are not precluded by the antitrust decree from enforcing any state-created rights they may have against those who dominate the Society when the state laws grant broader protections than the federal statutes.

argument. Both motions of each appellee should be denied.

CHARLES A. HORSKY,
ALVIN FRIEDMAN
701 Union Trust Building
Washington 5, D. C.

HERBERT CHEVETTE
11 West 60th Street
New York 23, New York

Attorneys for Appellants
Sam Fox Publishing Company, Inc.,
Maecenas Music Corporation,
Pleasant Music Publishing Corporation,
Jefferson Music Company, Inc.

COVINGTON & BURLING
Of Counsel

May, 1960